pass no property by it upon his death. Without this testamentary intent there can be no will.[5]

The Virginia case of *McBride* v. *McBride*,[6] is cited as not being opposed to such a construction of the letter as a will, but that case cites and affirms a dissenting opinion by Judge Cabell in *Sharp* v. *Sharp*,[7] which reads:

> "A paper is not to be established as a man's will, merely by proving, that he intended to make a disposition of his property similar to, or even identically the same with, that contained in the paper. It must satisfactorily appear that he intended the very paper to be his will."

This quotation undoubtedly condemns calling an instrument a will just because it may express what the testator would have done in his will, had he made one, but until he makes it, then such wishes cannot be given effect. That is the case at bar. The soldier by his letters showed he wished his wife to have his property upon his death, and thought she would get it by arrangements previously made, but he never intended this letter to operate as a will or even to pass any property at his death. He evidently thought he had formerly arranged the matter of his property.

The leniency of the courts towards the wills of active service men has directed its work rather to waiving technical formalities [8] than trying to construe as a will some writing that was not intended as testamentary. The *animus testandi* is a fundamental prerequisite, and cannot be supplied by any other than the testator himself. But when once shown it is well for the courts to show favor to soldiers and sailors by waiving formalities of execution. However when our courts begin to construe as done *animo testandi* what is really not so done, they may be doing justice in that particular case, but they are laying down as a precedent something that will make even more chaotic our present law of wills, with the result that the will chosen for a soldier, by the courts, may not be the instrument he actually made *animo testandi*.

While on this subject it may be interesting to read these two articles: "Odd French Wills," [9] and "Legal Objections Raised by the European War—Soldiers' Wills." [10]

F. B. F.

INFANTS—FRAUDULENT REPRESENTATIONS AS TO AGE—RELIEF FROM CONTRACT IN EQUITY.—The question whether in equity an infant will be estopped to allege infancy on a contract which was

[5] 40 Cyc. 1077; Early *v.* Arnold, 119 Va. 500, 89 S. E. 900 (1916); Clark *v.* Hugo (Va.), 107 S. E. 730 (1921); Smith *v.* Smith, 112 Va. 205, 70 S. E. 491 (1911).

[6] 26 Gratt. 476 (1875).

[7] 2 Leigh 249 (1830).

[8] See Leathers *v.* Greenaire, 53 Me. 561 (1866).

[9] Case and Comment, November 1917, p. 518.

[10] 79 Cent. L. Journal 388.

induced by fraudulent representations, has for the first time arisen in Virginia.

An infant representing that he was of full age and having the appearance of full age, executed a deed of trust, which contract the defendant was induced to enter believing the infant to be of age. Upon coming of age the infant brought an action in equity to have the contract set aside on the grounds of infancy. *Held*: Infant estopped to deny his infancy.[1]

Since the decisions are not in accord on this question it may be of interest and of value to briefly note the conflicting doctrines and the reasons assigned for the various holdings.

In England the courts of equity almost universally hold in accord with the doctrine as laid down by the Virginia Court and declare that an infant cannot take advantage of his own fraud.[2]

In America there are two classes of cases where estoppel may arise. The first, as in the instant case, where the infant is seeking to recover the property or reassert title and second where he sets up his infancy as a defense.

Where the infant seeks *affirmative relief* and goes into equity to have the contract set aside, it is held by sounder reasoning based on equitable principles that the infant should be estopped when guilty of fraud. This view is supported by the great weight of authority.[3] But the contrary is held in a few jurisdictions, the decisions being based on the ground that one under the disability of minority has no power to remove the disability by a representation, and that his representations cannot be of greater force than the contract itself.[4]

In the second class of cases, where the infant sets up his infancy as a *defense,* the weight of authority holds that estoppel does not apply.[5] But some jurisdictions hold that even in this case that equitable estoppel can be invoked.[6]

Although as will be seen there exists a conflict on this question it would seem that the doctrine as laid down by the Virginia Court of Appeals is more in accord with equity and good conscience and that the protection which the law affords an infant should not be used to perpetrate a fraud. For as said by Judge Prentis in delivering the opinion of the Court in the instant case:

"* * * we prefer to follow in this conflict in the American cases, that line which tends to discourage and prevent fraud,

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[1] Stallard *v.* Sutherland (Va.), 108 S. E. 568 (1921).

[2] Beckett *v.* Cordley, 1 Bro. ch. 352; Wright *v.* Snowe, 2 De. G. & S. 321 (1848). See Lempriére *v.* Lange, 12 Ch. Div. 675 (1879).

[3] Ingram *v.* Ison, 26 Ky. L. Rep. 48, 80 S. W. 787 (1904); Ostrander *v.* Quin, 84 Miss. 230, 36 So. 257 (1904); Ryan *v.* Growney, 125 Mo. 474, 28 S. W. 189, 755 (1894); La Rosa *v.* Nichols (N. J.), 105 Atl. 201 (1918).

[4] Tobin *v.* Span 85 Ark. 556, 109 S. W. 534, 16 L. R. A (N. S.) 672 (1908); Sims *v.* Evehardt, 102 U. S. 313, 26 L. Ed. 89 (1880).

[5] New York Building, Loan and Banking Co. *v.* Fisher (N. Y.), 23 App. Div. 363, 48 N. Y. S. 152 (1897); Commander *v.* Brazil, 88 Miss. 668, 41 So. 497, 9 L. R. A. (N. S.) 1117 (1906).

[6] Pemberton Bldg. & Loan Ass'n *v.* Adams, 53 N. J. Eq. 258, 31 Atl. 280 (1895); Damron *v.* Com., 110 Ky. 268, 61 S. W. 459 (1910).

and which is in accord with equitable doctrines. This infant * * * who falsely misrepresented his age, who was intelligent enough to appreciate the fraudulent scheme and * * * to attempt its execution, should not be aided by a court of equity to consummate such a fraud."[7]

T. S.

SALES—RESERVATION OF TITLE RECORDED UNDER VIRGINIA CODE 1919 SECTION 5189—SHIFTING STOCK OF GOODS—BONA FIDE PURCHASER.—The following are the facts in the case of *Rudolph* v. *Farmers' Supply Co.*:[1]

The plaintiff sold to private citizens, not dealing in automobiles, an automobile reserving title to secure the payment of notes given in consideration for the sale. The memorandum of the contract was recorded in the clerk's office as required by the Virginia Code 1919, § 5189. Later the purchasers sold the car to a dealer in second hand automobiles to become a part of his shifting stock of goods. The plaintiff had no knowledge that the car in question was in the hands of the dealer for sale, and a part of his stock. This dealer later sold it to a bona fide purchaser. A bill was filed by the plaintiff to enforce its vendor's lien. *Held*: Lien enforceable against the bona fide purchaser.

The general rule is well settled in Virginia that where a chattel mortgagee or owner stands by and permits a seller, who is a licensed or recognized dealer in such goods, to hold himself out to the world as owner, treat the goods as his own, place them with other similar goods in a public show room, offer them indiscriminately for sale, or do other acts which are inconsistent with the mortgage and tending to show complete ownership, such mortgagee or owner is estopped to assert his ownership against a purchaser for value without notice and such constructive notice as is furnished by due recordation is insufficient in these cases.[2] This is a well recognized exception to the doctrine that a vendor can transfer no better title than is vested in him.[3] When one considers the character of the sales and transactions of an ordinary retail merchant the necessity for this exception becomes apparent in order to afford protection to the public and to prevent a paralysis of business. In a recent case the Virginia Court decided that the bulk or value of the article mortgaged did not prevent the application of this exception.[4] The following extract from the opinion by Judge

[7] Stallard *v.* Sutherland, *supra.*

[1] (Va.) 108 S. E. 638 (1921).

[2] Addington *v.* Etheridge, 53 Va. 436 (1855); Perry *v.* Shenandoah National Bank, 68 Va. 755 (1876); Consolidated Tramway Co. *v.* Germania Bank, 121 Va. 331, 93 S. E. 572 (1917); Boice *v.* Finance, etc., Co., 127 Va. 563, 102 S. E. 591, 10 A. L. R. 654 (1920); O'Neil *v.* Cheatwood, 127 Va. 96, 102 S. E. 596 (1920). For discussion of these last two cases see Note 10 A. L. R. 662.

[3] Boice *v.* Finance, etc., Co., *Supra.*

[4] Boice *v.* Finance, etc., Co., *Supra.*